In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE THAMES AND MERSEY MARINE INSURANCE Company, Limited, Plaintiff in Error,
v.
THE UNITED STATES.
No. 616.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This case is in many respects analogous to *United States* v. *Frederick W. Hvoslef et al.*, No. 331, October Term, 1914.

As in that case, the action was brought against the United States under the Tucker Act of March 3, 1887, 24 Stat. 505, to recover internal revenue taxes paid without protest under the provisions of the War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, 460.

The cases differ only in the subject-matter of taxation. In the *Hvoslef* case the taxes were paid upon charter parties for vessels engaged in the

export trade. In the *instant* case the taxes were paid on policies of marine insurance covering cargoes exported from the United States.

It is insisted for the Government:

First. That the District Court was without jurisdiction of the action.

Second. That the petition fails to state a cause of action.

Third. That the tax on policies of marine insurance imposed by the War Revenue Act is constitutional.

ARGUMENT.

I.

The District Court was without jurisdiction of the action.

1. The claim of the petitioner was presented to the Commissioner of Internal Revenue and by him rejected. The remedy of petitioner was therefore an action against the Collector of Internal Revenue and not against the United States.

It is not necessary to amplify what has been said on this subject on behalf of the Government in the briefs filed in *United States* v. *Emery, Bird, Thayer Realty Company,* No. 117 on the present docket of this court, and *United States* v. *Frederick W. Hvoslef et al.,* No. 331.

2. It does not affirmatively appear that the action was brought in the district in which the petitioner resides.

As pointed out in the brief in the last named cause, this is a jurisdictional requirement under the Tucker Act.

The petition avers (R. 2) that--

> The Thames & Mersey Marine Insurance Company, Limited, is and was a corporation engaged in the business of underwriting policies of marine insurance in the City of New York, within the District aforesaid, between the first day of July, 1898, and the first day of July, 1901. Its principal office for conducting said business in the United States and its residence was and is in the Borough of Manhattan, City of New York, in said District.

It is submitted that this is not tantamount to a legal averment that the petitioner is a resident of the district in which the action is brought, for the reason that it fails to allege that petitioner was incorporated under the laws of the State of New York.

An allegation that a corporation is doing business in a certain State does not necessarily import that it was created by the laws of that State. *Brock* v. *Northwestern Fuel Co.,* 130 U. S. 341. In the absence of some express statute to the contrary, a corporation is in law a resident only of the jurisdiction in which it was incorporated.

In *Insurance Co.* v. *Francis,* 11 Wall. 210, 216, the court said:

> The declaration avers that the plaintiff in error (the defendant in the court below) is a corporation created by an act of the legislature of the State of New York, located

> in Aberdeen, Mississippi, and doing business there under the laws of the State. This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot on that account acquire a residence there.

In *Shaw* v. *Quincy Mining Co.*, 145 U. S. 444, Mr. Justice Gray, after stating and quoting from a number of cases (pp. 451–452) said (p. 453), in effect, that it has long and uniformly been declared to be the law by the Supreme Court "within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different States, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated."

II.

The petition fails to state a cause of action in that it does not show that the tax was paid involuntarily and after protest.

On this subject we rely on what has been said in the brief for the Government in *United States* v. *Hvoslef*, No. 331.

III.

The tax which was imposed upon policies of marine insurance was not unconstitutional.

The provision under which the tax was collected reads as follows (30 Stat. 461):

> Insurance (marine, inland, fire): Each policy of insurance or other instrument, by whatever name the same shall be called, by which insurance shall be made or renewed upon property of any description (including rents or profits), whether against peril by sea or inland waters, or by fire or lightning, or other peril, made by any person, association, or corporation, upon the amount of premium charged, one-half of one cent on each dollar or fractional part thereof: *Provided,* That purely cooperative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property and not for profit shall be exempted from the tax herein provided.

The underlying proposition upon which the petition is based is that the taxation of a contract insuring exports amounts to a tax upon exports themselves on the theory that the contract of insurance is a necessary part of the exportation.

The difficulty of this argument is that it wholly overlooks the distinction between instruments of exportation and incidents of exportation, to which latter class policies of marine insurance clearly belong.

In a long line of decisions, beginning with *Paul* v. *Virginia,* 8 Wall. 168, and ending with *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, wherein the cases are collected and reviewed (pp. 502–508), it has been firmly established that insurance is not commerce; that a contract of insurance is not an instrumentality of commerce; that the making of such a contract is a mere incident of commercial intercourse; and that in this respect there is no difference between a contract of marine insurance and one covering risks by fire. *Hooper* v. *California,* 155 U. S. 648.

It is for the reason that insurance is a mere incident and not a part of commerce that the State's power over the subject is absolute and not limited by the interstate commerce clause of the Constitution. As was said in the *Deer Lodge* case, *supra,* p. 506, in discussing the decision in *Hooper* v. *California, supra:*

> * * * To the attempt to distinguish between policies of marine insurance and policies of fire insurance, and thus take the former out of the rule of *Paul* v. *Virginia,* it was answered, "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other." And it was pointed out that if the power to regulate

> interstate commerce applied to all of the incidents of such commerce and "to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature." And then, sweeping away the distinction between the different subject-matters of insurance contracts, and the different events indemnified against, and declaring the principle applicable to all and determinative of the regulating power of the States over all, it was said, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"

If insurance is not commerce under the interstate commerce clause, surely it cannot be foreign commerce within the meaning of the clause exempting exports from a tax by Congress. Exports are goods carried in foreign commerce, and in order to be an export the article or thing must be a part of that commerce. A vessel, a bill of lading, or a manifest, may be a part of that commerce because an instrument of exportation. How widely insurance on articles exported differs from

these instrumentalities it needs no elaborate argument to demonstrate.

A policy of insurance is in essence an agreement to pay money upon the happening of a certain contingency. When that contingency arises the policy becomes a chose in action, to be reduced to possession at the place where the policy was entered into or at the domicile of the insurer, as the terms of the policy may prescribe. At no period of its existence does a policy transfer any title whatever to the goods insured nor stand as their representative. The sole connection between the two is the fact that loss or damage occurring to the goods fixes the time when and the contingency upon which a right of action accrues upon the policy.

It is suggested in the brief for the plaintiff in error that the policy itself is an article exported because it is forwarded to the foreign consignee and actually makes the trans-oceanic voyage. Of course, there may be some property right in the actual document itself, and some monetary value, although infinitesimal, in the sheets of paper which compose it. But to say that by reason of this fact it is an " article " of export is at least highly fanciful. The sole importance of the policy is its evidentiary character as proving the contract made, which might be established even after the loss or destruction of the policy itself, and without which the document is so much waste paper.

Moreover, such a paper is no more an article of export within the meaning of the Constitution than a deed for real estate in this country which is mailed for safe-keeping to a foreign grantee. It would require some stretch of the imagination to hold a stamp tax upon the latter a tax upon articles exported.

The taxes involved in this case affect articles exported in only the most remote and incidental manner, and a provision therefor is no more unconstitutional than an act of Congress in regulation of commerce which has a mere incidental effect upon exportations (*Armour Packing Co.* v. *United States,* 209 U. S. 56, 79–80; *C. B. & Q. Ry. Co.* v. *United States,* 209 U. S. 90); or than a law of a State passed in the exercise of the police power and having that as its primary purpose, with a remote and incidental effect, however, upon interstate commerce. *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 50.

The effect of a contrary holding must not be overlooked. To say that taxation of the insurance of goods exported from this country is unconstitutional means the giving of immunity from all taxes of every kind and description, to all property and persons in any way incidentally connected with foreign trade. The States are prohibited by Article 1, section 10, paragraph 2, of the Constitution from imposing any imposts or duties on imports or exports. And Mr. Justice Bradley in *Turpin* v.

Burgess, 117 U. S. 504, said with reference to these parallel provisions of the Constitution (p. 506):

> * * * the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State.

There seems no limit to the tax exemption which would necessarily result from a decision holding this tax unconstitutional. If one incident of foreign commerce is exempt all incidents are so exempt. No line of distinction can be drawn between one incident and another if the clear, well-defined, line of demarcation between incidents of commerce and instrumentalities of commerce is to be abandoned.

Apparently the petitioner in the preparation of its brief was not entirely oblivious to the distinction, for, in order to colorably surmount this obstacle it is alleged in the fifth paragraph of the petition (R. 3) that,—

> Your petitioner is informed and believes that bills of exchange were drawn by the exporters against the respective consignees of said products and merchandise for the price thereof and that the bills of lading for said products and merchandise, so exported as aforesaid, and the said certificates of insurance were required, by custom and usage, as documents necessary to enable the said export to be made and the said bills of exchange to be discounted and were actually

forwarded to the foreign country to which each such export was made.

These allegations, however, are allegations of general business usage, of which the court takes judicial notice. The court judically knows that it is business policy today, and has been for all time, to insure goods passing in foreign commerce. This is, however, a mere matter of business convenience. A contract of insurance does not in any way assist to carry the goods or to start them on their voyage, nor even to evidence the title thereto, and has no physical relation whatever to foreign commerce.

CONCLUSION.

For these reasons, as well as those stated at more length in the brief filed in *United States* v. *Hvoslef*, No. 331, above referred to, the judgment of the court below should be affirmed.

JOHN W. DAVIS,
Solicitor General.

THEODOR MEGAARDEN,
Attorney.

JANUARY, 1915.

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Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR, *vs.* FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT.	No. 331.	2
THE THAMES AND MERSEY MARINE INSURANCE COMPANY, LIMITED, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.	No. 616. Motion to Advance.	3

Come now the defendants in error, Frederick W. Hvoslef and William S. Walsh, Survivors of William Bennett, in the cause first entitled as above, and The Thames and Mersey Marine Insurance Company, Limited, plaintiff in error, in the cause secondly entitled as above, by their counsel, Everett P. Wheeler, in their behalf, and move

4 the Court on the records duly filed herein, and on the annexed affidavit of Henry M. Hewitt, to advance the hearing of the above entitled causes and set the same for argument at some time during the present term of this Court, and to grant to the said parties such other and further relief as they may be entitled to receive.

EVERETT P. WHEELER,
Of Counsel for Frederick W. Hvoslef and others.

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SUPREME COURT OF THE UNITED STATES, 7

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FREDERICK W. HVOSLEF and WILLIAM S. WALSH, Survivors of WILLIAM BENNETT. 8

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THE UNITED STATES.

No. 616.

UNITED STATES OF AMERICA, Southern District of New York, } ss.: 9

HENRY M. HEWITT, being duly sworn, deposes and says:

1. I am an attorney at law in the office of the firm of Haight, Sandford & Smith, attorneys at law in the City of New York. They were the attorneys for the defendants in error in the action first entitled as above, and for the plaintiff in error in the action secondly entitled as above, in

10 the District Court of the United States for the Southern District of New York, and I am familiar with the said cases and with the proceedings therein. The cause first entitled as above which will hereinafter be described as the Hvoslef case, was begun in said last mentioned Court February 10th, 1913, by the filing of a petition in said Court, asking for the refund of certain stamp taxes which had been demanded and received by the United States of America, and claimed under the provisions of the War Revenue Act of Congress approved June 13th, 1898, by which Act it was enacted that on every
11 charter-party there should be levied, collected and paid a certain tax therein specified. The said petition alleged that the said requirement of said War Revenue Act was in violation of the Ninth Section of the First Article of the Constitution of the United States, which provides—"No tax or duty shall be laid on articles exported from any state." The charter-parties upon which taxes were paid by the defendants in error, were alleged in said petition to be for vessels used entirely in the export trade from States of the United States.

12 2. The said petition was filed and the said action brought pursuant to an act of Congress approved July 27th, 1912. The said action was first heard before Honorable Walter C. Noyes, United States Circuit Judge, who delivered an opininon in favor of the plaintiffs in the Court below and held the taxes on charter-parties of vessels for export of goods from the United States to foreign countries to be unnconstitutional. The cause was afterwards heard before Honorable George C. Holt, United States District Judge. Upon the

pleadings and proofs he directed judgment be entered in favor of the plaintiffs for $353. To review the judgment so entered, a writ of error was sued out by the United States and the record in said suit was filed in this Court January 7, 1914. 13

3. The cause secondly entitled as above, which will be hereinafter described as the Thames and Mersey case, was brought by The Thames and Mersey Marine Insurance Company, in said District Court against the United States of America by a petition filed June 26th, 1914. This suit was brought pursuant to the said act of Congress approved July 27th, 1912, to recover certain revenue taxes amounting to $5,500 which had been assessed on marine policies of insurance underwritten by the petitioner, now plaintiff in error, which did insure against marine risks certain merchandise exported by the United States to foreign countries. It claimed in said petition that the provisions of the said War Revenue Act, whereby a tax was levied on every policy of marine insurance, was in violation of said section of the Constitution of the United States, so far as it applied to revenue stamps required to be paid in respect of policies of marine insurance upon articles exported from any State. The defendant demurred to said petition. The said demurrer was heard before Honorable L. Hand, District Judge, in July, 1914, who rendered an opinion that the provisions of said War Revenue Act, so far as they applied to taxes on policies of marine insurance upon articles exported, were constitutional. He thereupon ordered that the demurrer be sustained and judgment dismissing the petition was rendered in favor of the defendant August 18th, 1914. The said Thames & Mersey Company there- 14 15

upon sued out a writ of error and the record pursuant to the requirement of said writ was filed in this Court, September 4th, 1914.

4. The questions involved in these cases as to the true construction and effect of said section of the Constitution of the United States, are of great importance, not only to the parties to the litigation but to the general public, and they should therefore be decided finally by this Court at an early day. I respectfully submit that it would be in the interest of justice that the two cases should be advanced and should be heard together, inasmuch as they involve the construction and effect to be given to said section of the Constitution of the United States.

5. One of the points taken by the United States in both cases, was that the action should have been brought against the Collector of Internal Revenue and not against the United States. This contention was overruled in the Hvoslef case and was not sustained in the Thames & Mersey case. There is another case pending in this Court, Number 117 on the docket, United States, Plaintiff in Error, *vs.* Emery, Bird, Thayer Realty Company, in which this question also arises. The other questions in that case relate to the construction and effect of Section number 38 of the act of Congress entitled an act to provide revenue, etc., approved August 5th, 1909, and are entirely different from the constitutional questions which arise in the cases in which this motion is made. Inasmuch as the question of jurisdiction arises in all three cases, I respectfully submit that it would be con-

venient if the cases in which this motion is made, should be assigned to be heard after Number 117.

HENRY M. HEWITT.

Sworn to before me this 2nd day of November, 1914.

J. DEXTER CROWELL,
Notary Public,
Kings Co.
Certificate filed in N. Y. Co.

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TAKE NOTICE that the defendants in error in the action first above entitled, and the plaintiff in

22 error in the action secondly above entitled, will on Monday the 9th day of November, 1914, or as soon thereafter as counsel can be heard, submit to this Court for its decision thereon, the motion and affidavit of which the foregoing are a copy.

EVERETT P. WHEELER,
of Counsel for Motion.

To the Attorney General of the United States.

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